

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

DIRECTOR, DEPARTMENT OF LABOR
AND INDUSTRIAL RELATIONS,

Complainant,

v.

VALLEY ISLE BUILDERS, INC.

Respondent.

CASE NO. OSH 2009-8
Inspection No. 311434344

ORDER NO. 339

ORDER GRANTING
COMPLAINANT'S MOTION TO
DISMISS RESPONDENT'S
CONTEST

ORDER GRANTING COMPLAINANT'S
MOTION TO DISMISS RESPONDENT'S CONTEST

Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS (Complainant) issued a Citation and Notification of Penalty on February 17, 2009, to Respondent VALLEY ISLE BUILDERS, INC. (Respondent). Respondent received the Citation and Notice of Penalty on February 18, 2009.

By letter dated March 3, 2009, and file-stamped by Complainant on March 4, 2009, Respondent requested an informal conference. The informal conference was ultimately scheduled for March 10, 2009, at 1:00 p.m., via telephone. Complainant did not call Respondent until sometime between 1:24 and 1:27 p.m. on March 10, 2009, and was unable to reach Respondent. Respondent was using his cellular telephone at the time and was unable to return Complainant's call because there was no caller identification, and his message box was full.

By letter dated March 11, 2009, and post-marked March 12, 2009, Respondent contested the Citation. On April 29, 2009, the Hawaii Labor Relations Board (Board) received from Complainant a Notice of Contest by Respondent. Respondent was contesting Citation 1, Items 1a and 1b; Citation 1, Item 2; Citation 1, Item 3; and Citation 1, Item 4 resulting from Inspection No. 311434344.

In Complainant's Initial Conference Statement filed May 18, 2009, and at the Initial/Settlement Conference held by the Board on May 21, 2009, Complainant raised the issue of whether Respondent's Notice of Contest was untimely. On June 22, 2009, Complainant filed a Motion to Dismiss Respondent's Contest on the grounds that the Board lacks jurisdiction to entertain this appeal. On July 22, 2009, the Board heard oral

argument on the Motion to Dismiss Respondent's Contest, with Respondent appearing via telephone.

After careful consideration of the arguments, pleadings, and record in this case, the Board makes the following findings of fact, conclusions of law, and decision and order granting Complainant's Motion to Dismiss Respondent's Contest, for the reasons discussed below.

FINDINGS OF FACT

1. Respondent Valley Isle Builders, Inc., was at all relevant times a licensed contractor and employer in the State of Hawaii performing mostly residential and some commercial construction.
2. On September 9, 2008, the Hawaii Occupational Safety and Health Division (HIOSH), Department of Labor and Industrial Relations, State of Hawaii, performed a planned, comprehensive inspection at Lot 29, Kupuohi St., Lahaina, Hawaii, 96761, where Respondent was performing work. The Inspection number is 311434344.
3. As a result of the inspection, HIOSH issued the following citations to Respondent:

Citation 1, Item 1a: Serious [\$750.00 penalty assigned]

29 CFR 1926.451(a)(1) [Refer to chapter 12-130.1, [Hawaii Administrative Rules] HAR] was violated because:

Job made scaffold planking constructed of 2 x 4's with plyboard on top were observed bending several inches under the weight of two employees standing on the same section of planking. The lack of scaffold grade planking exposed the employees working on top of the job made scaffold planking to potential serious injuries from fall hazards.

29 CFR 1926.451(a)(1) states "Except as provided in paragraphs (a)(2), (a)(3), (a)(4), (a)(5), and (g) of this section, each scaffold and scaffold component shall be capable of supporting, without failure, its own weight and at least 4 times the maximum intended load applied or transmitted to it."

Citation 1, Item 1b: Serious [No penalty assigned]

29 CFR 1926.451(f)(16) [Refer to chapter 12-310.1, HAR] was violated because:

Job made scaffold planking was constructed of 2 x 4's with plywood on top were observed bending several inches under the weight of two employees standing on the same section of planking. The lack of scaffold grade planking exposed the employees working on top of the job made scaffold planking to potential serious injuries due to fall hazards.

29 CFR 1926.451(f)(16) states "Platforms shall not deflect more than 1/60 of the span when loaded."

Citation 1, Item 2: Serious [\$750.00 penalty assigned]

29 CFR 1926.451(f)(3) [Refer to chapter 12-130.1, HAR] was violated because:

The company did not designate a competent person to inspect the tubular welded scaffolding system being used on the site for any visible defects before each work shift, and after any occurrence which could affect a scaffold's structural integrity. The lack of an inspection by a competent person exposed the employees working on the scaffolding to potential serious injuries from fall hazards.

29 CFR 1926.451(f)(3) states "Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity."

Citation 1, Item 3: Serious [\$1500.00 penalty assigned]

29 CFR 1926.451(g)(1) [Refer to chapter 12-130.1, HAR] was violated because:

Three employees working 15 feet above the lower level on a tubular welded scaffold system were not protected from falling to the concrete floor below by any means of fall

protection. The lack of fall protection exposed the employees to potential serious injuries due to fall hazards.

29 CFR 1926.451(g)(1) states “Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(I) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

Note to paragraph (g)(1): The fall protection requirements for employees installing suspension scaffold support systems on floors, roofs, and other elevated surfaces are set forth in Subpart M of this part.”

Citation 1, Item 4: Serious [\$750.00 penalty assigned]

29 CFR 1926.454(b)(3) [Refer to chapter 12-130.1, HAR] was violated because:

The foreman in charge of maintaining a 3 stage high tubular welded scaffolding system with job made scaffold planking did not know the maximum intended load-carrying capacities of the scaffold system.

29 CFR 1926.454(b)(3) states “The employer shall have each employee who is involved in erecting, disassembling, moving, operating, repairing, maintaining, or inspecting a scaffold trained by a competent person to recognize any hazards associated with the work in question. The training shall include the following topics, as applicable: The design criteria, maximum intended load-carrying capacity and intended use of the scaffold.”

Citation 2, Item 1: Other [No penalty assigned]

29 CFR 1910.178(l)(1)(ii) [Refer to chapter 12-129.1, HAR] was violated because:

The operators of a Highlander 844 TT-34 power industrial truck did not successfully complete the required training and were allowed to operate the truck.

29 CFR 1910.178(l)(1)(ii) states “Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (l), except as permitted by paragraph (l)(5).”

Citation 2, Item 2: Other [No penalty assigned]

29 CFR 1910.178(q)(7) [Refer to chapter 12-129.1, HAR] was violated because:

A Highlander 844 TT-34 power industrial truck was not equipped with an operable horn.

29 CFR 1910.178(q)(7) states “Industrial trucks shall be examined before being placed in service, and shall not be placed in service if the examination shows any condition adversely affecting the safety of the vehicle. Such examination shall be made at least daily.

Where industrial trucks are used on a round-the-clock basis, they shall be examined after each shift. Defects when found shall be immediately reported and corrected.”

4. The Citation and Notification of Penalty resulting from Inspection number 311434344 was issued by HIOSH on February 17, 2009, and sent via certified mail to Respondent’s business address at 283 Wiliko Street #10, Lahaina, Hawaii, 96761.
5. The Citation and Notification of Penalty was received by Respondent’s owner, Lars Bertelsen (Bertelsen), on February 18, 2009.
6. The Citation and Notification of Penalty informed Respondent of its right to contest, providing in relevant part:

Employers’ Right to Contest – You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest

penalties and/or abatement dates without contesting the underlying violations. Unless you inform the Administrator in writing that you intend to contest the citation(s) and/or penalty(ies) within 20 calendar days after receipt, the citation(s) and the penalty(ies) will become a final order of the Department of Labor and Industrial Relations and may not be reviewed by any court or agency. Once a letter of contest is received, it becomes the jurisdiction of the [Board]. (Emphases original).

7. The Citation and Notification of Penalty also informed Respondent of its right to have an informal conference, and cautioned Respondent that the running of the twenty-day contest period is not interrupted by an informal conference:

Informal Conference – An informal conference is not required. However, if you wish to have such a conference you may request one with the Administrator during the 20 calendar day contest period. During such an informal conference, you may present any evidence or views which you believe would support an adjustment to the citation(s) and/or penalty(ies).

If you are considering a request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so. Please keep in mind that a written letter of intent to contest must be submitted to the Administrator within 20 calendar days of your receipt of this Citation. The running of this contest period is not interrupted by an informal conference.

8. By letter dated February 23, 2009, HIOSH reminded Respondent, inter alia, “Please review your materials for your rights with regard to informal conferences, contests, with the Appeals Board, and requests for more time to correct violation(s).” The letter included two telephone numbers and one facsimile number by which Respondent could contact HIOSH.
9. By letter dated March 3, 2009, and file-stamped by HIOSH on March 4, 2009, Respondent requested an informal conference.

10. In response to Respondent's request for an informal conference, Rommel Delfino (Delfino) of HIOSH sent an e-mail to Respondent on March 6, 2009, informing Respondent that HIOSH would try to schedule an informal conference "within the 20 day window and that's this coming Tuesday, March 10." The e-mail included HIOSH's telephone and facsimile numbers.
11. Robyn Sakai (Sakai) of HIOSH also sent Respondent an e-mail on March 6, 2009, informing Respondent that an informal conference was tentatively scheduled for Monday, March 9, 2009, at 1:00 p.m. The e-mail included Sakai's telephone number.
12. Respondent sent an e-mail to HIOSH on March 6, 2009, indicating that Bertelsen was available for an informal conference on Tuesday, March 10, 2009.
13. An informal conference was scheduled for March 10, 2009, at 1:00 p.m. via telephone conference; however, HIOSH did not call Respondent until sometime between 1:24 and 1:27 p.m., and was unable to reach Respondent. Respondent was using his cellular telephone at the time and was unable to return the telephone call from HIOSH because there was no caller identification, and his message box was full.
14. At 4:09 p.m. on March 10, 2009, Daniel S. Bulkley (Bulkley) of HIOSH sent an e-mail to Respondent, stating:

Mr. Bertelsen, I was unable to call you at 1:00 p.m. this afternoon, I tried calling you at 1:24 p.m., but could only leave a message. I tried calling again this afternoon at 4:00 p.m. and again left a message. We needed to complete this informal today to be within the 20 days, if you cannot call me today, you will need to mail a letter of contest to reserve your rights. The letter has to be post marked today to meet the contest criteria, I had left the message that we could try and set-up later but I was reviewing your paperwork and the last day this office can address your issues is today. If you call me we can still complete before 4:30 p.m., if not you will need to go through the Attorney General's Office, I would still submit some recommendations, but I cannot handle your case after today. Please email/call me immediately so we can discuss your case.

15. On March 11, 2009, Bertelsen sent an e-mail to Bulkley, stating:

I was by the phone 1-2pm I did receive a call about 1.27 but from an unknown number on the caller ID so unable to return call.

2pm and onward I was on a jobsite with a client.

What is my next step, I will be out of town from Friday to Tuesday.

If you call me, please call from a phone that will give me a caller ID as I usually never answer Unknown or private ID calls due to the many telemarketers calling daily and wasting my time.

16. Later on March 11, 2009, Bulkley sent an e-mail to Bertelsen, stating:

As I mentioned in yesterday's last telephone messages and in my e-mail, because of our 20th day rules our agency has to abide by, I needed you to send a letter of Contest that needed to be post marked to us yesterday to reserve your rights. Again this would allow you the ability to still address your issues and concerns with the Attorney General's Office with our input as requested by them. If you did not send that letter of Contest yesterday, I'm not sure what we will be able to do. I would suggest you still send a letter of contest immediately so I can contact the Attorney General's Office and see how they want to proceed. I can not [sic] call from a telephone other than our telephones unfortunately; I do not have the ability to change our telephone system regarding whether the telephone number is a listed number and caller information is provided.

17. Later on March 11, 2009, Bertelsen sent an e-mail to Bulkley, stating:

A letter has been mailed, but not postmarked yesterday.

Since our conference was scheduled 1PM and I received no call I am sure that will be taken into consideration.

Thanks for your help in this matter, should I have any questions I may call your agency for advise [sic] on how to proceed.

18. By letter dated March 11, 2009, Respondent sent its “Notice to Contest, Inspection# 311434333” to HIOSH. This Notice to Contest was post-marked March 12, 2009.¹
19. On April 29, 2009, the Board received from Complainant a Notice of Contest by Respondent. Respondent was contesting Citation 1, Items 1a and 1b; Citation 1, Item 2; Citation 1, Item 3; and Citation 1, Item 4 resulting from Inspection No. 311434344.
20. In Complainant’s Initial Conference Statement filed May 18, 2009, and at the Initial/Settlement Conference held by the Board on May 21, 2009, Complainant raised the issue of whether Respondent’s Notice of Contest was untimely.
21. On June 22, 2009, Complainant filed a Motion to Dismiss Respondent’s Contest on the grounds that the Board lacks jurisdiction to entertain this appeal.
22. On July 22, 2009, the Board heard oral argument on the Motion to Dismiss Respondent’s Contest, with Respondent appearing via telephone.
23. The Board finds that the Citation and Notification of Penalty resulting from Inspection number 311434344 was issued by HIOSH on February 17, 2009, and sent via certified mail to Respondent’s business address; and the Citation and Notification of Penalty was received by Respondent’s owner, Bertelsen, on February 18, 2009. The deadline for Respondent to have properly contested the Citation and Notification of Penalty was therefore March 10, 2009. However, Respondent did not contest the Citation and Notification of Penalty until the letter dated March 11, 2009, and post-marked on March 12, 2009.
24. Respondent received ample notification of the limited period in which he could contest the Citation and Notification of Penalty, and was provided telephone numbers, a fax number, and e-mail addresses via which he could have contacted HIOSH with any questions prior to the expiration of the twenty-day period to appeal. Respondent was further informed by HIOSH that an informal conference does not toll the running of the twenty-day contest period.

¹“Postmark” is defined as “an official postal marking on a piece of mail; *specif.*: a mark showing the post office and date of mailing.” Merriam Webster’s Collegiate Dictionary 910 (10th ed. 1994).

25. The fact that an informal contest was requested by Respondent and attempted by the parties; that HIOSH did not call Respondent until sometime between 1:24 and 1:27 p.m. for the scheduled 1:00 p.m. informal conference on March 10, 2009; and that HIOSH was unable to reach Respondent via telephone for the informal conference on March 10, 2009, does not extend the twenty-day period of time to contest the Citation and Notification of Penalty.
26. Respondent's contest of the Citation and Notification of Penalty is untimely,² and therefore the Board lacks jurisdiction over the appeal.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over appeals from HIOSH citations pursuant to Hawaii Revised Statutes (HRS) §§ 396-3 and 396-11.
2. The Hawaii Supreme Court has held that the right of appeal is purely statutory, and therefore the right of appeal is limited as provided by the legislature and compliance with the method and procedure prescribed by it is mandatory. In re tax appeal of Lower Mapunapuna Tenants Assn., 73 Haw. 63, 69, 828 P.2d 263, 266 (1992).
3. In Si-Nor, Inc. v. Director, Dept. of Labor and Indus. Relations, 120 Hawai'i 135, 145, 202 P.3d 596, 606 (2009), the Hawaii Intermediate Court of Appeals cited with approval the following quote from Love v. College Level Assessment Services, Inc., 928 S.W.2d 36, 38 (Tenn. 1996):

[T]he timely perfecting of an appeal is no mere technical formality: it is in fact a mandatory requirement, and if it is not complied with, the court has no jurisdiction over the case.
4. To the extent the failure to timely perfect an appeal divests an appellate body of jurisdiction, such failure cannot be waived by the parties or the appellate body. See State v. Johnston, 62 Haw. 9, 619 P.2d 1076 (1980) ("A jurisdictional defect in an appeal cannot be waived by the parties or disregarded by us.").

²See Micro Lapping & Grinding Co. v. Unemployment Comp. Bd. of Review, 486 N.E.2d 225, 227 (Ohio Ct. App. 1984) ("The requirement that a mailed application to institute a further appeal be 'postmarked' prior to the running of the appeal time, has been limited to a post office postmark.").

5. HAR § 12-51-19, governing employer contests of citations, provides (emphasis added):

Employer contests of citation, proposed penalty or both. Any employer to whom a citation and notice of proposed penalty has been issued may petition the director for review of the citation and notice pursuant to the rules of the appeals board within twenty days of the receipt by the employer of the notice of proposed penalty. Each notice of contest shall specify whether it is regarding the citation, the proposed penalty, or both. This petition shall be an original, and shall be served on the director and must be postmarked, or if not mailed, received by the director within twenty calendar days of the receipt by the employer of the citation and notice of proposed penalty. If not mailed, the date of receipt by the director shall be the date stamped on the contest by the director. The department will forward a copy of the petition to the appeals board. A de novo hearing shall be held by the appeals board. Copies of each petition shall be posted where they shall be readily observed by all affected employees.

6. Similarly, HRS 396-11, provides in relevant part:

- (a) Any citation, proposed penalty, or order of the director shall be final and conclusive against the employer unless the employer files with the director a written notice of contest of the citation, the abatement period stated in the citation, the proposed penalty, or order within twenty days after receipt of the citation, proposed penalty, or order.

7. The Citation and Notification of Penalty resulting from Inspection number 311434344 was issued by HIOSH on February 17, 2009, and sent via certified mail to Respondent's business address; and the Citation and Notification of Penalty was received by Respondent's owner, Bertelesen, on February 18, 2009. The deadline for Respondent to have properly contested the Citation and Notification of Penalty was therefore March 10, 2009. However, Respondent did not contest the Citation and Notification of Penalty until the letter dated March 11, 2009, and post-marked on March 12, 2009.

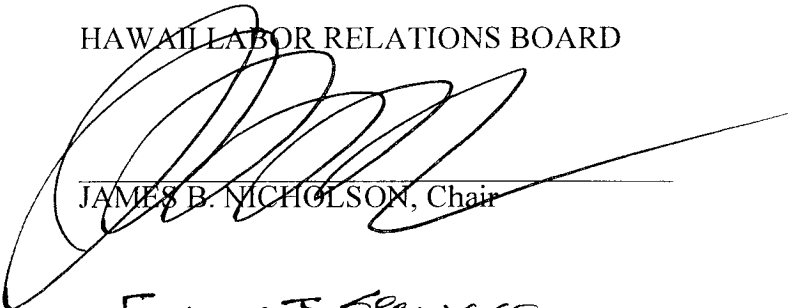
8. Respondent received ample notification of the limited period in which he could contest the Citation and Notification of Penalty, and was provided telephone numbers, a fax number, and e-mail addresses via which he could have contacted HIOSH with any questions prior to the expiration of the twenty-day period to appeal. Respondent was further informed by HIOSH that an informal conference does not toll the running of the twenty-day contest period.
9. The fact that an informal conference was requested by Respondent and attempted by the parties; that HIOSH did not call Respondent until sometime between 1:24 and 1:27 p.m. for the scheduled 1:00 p.m. informal conference on March 10, 2009; and that HIOSH was unable to reach Respondent via telephone for the informal conference on March 10, 2009, does not extend the twenty-day period of time to contest the Citation and Notification of Penalty.
10. Respondent's contest of the Citation and Notification of Penalty is untimely, and therefore the Board lacks jurisdiction over the appeal

ORDER

For the reasons discussed above, the Board hereby grants Complainant's Motion to Dismiss Respondent's Contest.

DATED: Honolulu, Hawaii, August 12, 2009.

HAWAII LABOR RELATIONS BOARD



JAMES B. NICHOLSON, Chair



EMORY J. SPRINGER, Member



SARAH R. HIRAKAMI, Member

Copies sent to:
Robyn M. Kuwabe, Deputy Attorney General
Lars Bertelsen, Owner